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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., a Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition misses much of the thrust of the petition for certiorari, largely fails to meet the issues raised therein, and gives an overall impression of "why bother" in the first place. It is submitted that the respondent's cursory and almost

casual treatment of the issues raised in this case should not cause the Court's attention to be distracted from the important questions of first impression presented by this petition. At this point petitioner urges this Court to consider the points in issue in a more meaningful and informed manner than have either the respondent or the court and Commission below.

Before beginning a point-by-point refutation of the brief in opposition, petitioner desires to raise at the outset two propositions: First, that the brief in opposition completely misconstrues the *Forster* decision (see discussion *infra,* at pp. 9-12) and wholly ignores the conflict with the decision of the Court of Appeals. Second, that the respondent is way wide of the mark in its argument that petitioner was not denied Due Process by the failure of the Commission to allow petitioner to make out its Section 2(b) defense through cross-examination of the witnesses relied upon to establish the Section 2(d) violation (see discussion *infra* at pp. 13-16).

1. Respondent states at the outset of its argument that since the Court of Appeals upheld the findings of the Commission in this case, they are either not open to challenge or, if open to challenge, their correctness is "not open to serious question by the Court". (R.Br., p. 8) The simple answer to this contention is this Court's holding in *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 39 (1958) that lower court and Commission action in Robinson-Patman Act cases is always open to scrutiny where such action "misapprehends and grossly misapplies" a standard under the Act. This is precisely what petitioner is alleging has occurred in the instant case, both at the Commis-

sion and Court of Appeals levels, and the findings relating to such action is therefore open to review by this Court.

2. In its counterstatement of the case, respondent, in emulation of the Court of Appeals, states that petitioner's table of competitors' advertisements, "unexplained by any testimony, was insufficient to demonstrate that petitioner's discriminatory allowances had been made to meet competition in individual competitive situations . . . ." (R.Br., p. 7). Respondent also refers to the table of ads in a rather uncomplimentary manner as having "been compiled strictly for use in the Commission proceeding—by going through old newspapers (R. 210)". (R.Br., p. 5). Petitioner has difficulty in understanding why the table of ads and its relevance to these proceedings has been misunderstood first by the Court of Appeals and now the respondent. Although petitioner dealt with this point in the petition (p. 19; see especially Note 10), fuller explanation is now called for in order that this Court not be mislead by the respondent's failure to appreciate the table's significance.

During the course of the hearings after remand, petitioner did its best to make out its Section 2(d) defense by calling those favored customers who were still available and by quizzing these customers as to ads run by them and paid for by petitioner's competitors, which ads had been run by the favored customers shortly before they had run the discriminatory ads paid for by petitioner. (JA 301-16). The purpose of placing the ads in the record was to demonstrate that prior to petitioner's discriminatory ads competitors had previously paid for ads run by the favored customers. At the close of the hearings, petitioner de-

sired to formulate a shorthand method for presenting this otherwise unwieldy evidence in an easily understandable format. Petitioner decided that the easiest way to accomplish this was by a table of ads, giving the name of the store running the ad, the date of the prior competitor's ad, the name of such competitor, and the date of petitioner's ad placed in an attempt to meet the competitive challenge afforded by the competitor's ad. (See Table, JA 221). Admittedly this table was checked against the "old newspapers" which had run the ads in the first place. However, this was not an ex post facto rationalization of previous conduct as the respondent would apparently have it, but rather simply an attempt on the part of petitioner to present a graphic illustration of its actions vis-a-vis those of its competitors.

The statement that the table was "unexplained by any testimony" is simply wrong, and demonstrates a basic misunderstanding of the table, both in relation to its source and its purpose. (See Pet., p. 19, Note 10, for references to evidence which explained the ads making up the table.)[1] Respondent continues this misunderstanding in its Argument, p. 8, where it states that "there was absolutely no evidence that petitioner knew these customers were receiving allowances and reasonably believed that it must meet such allowances". Respondent further argues that petitioner's evidence did not demonstrate an "awareness" of its competitors' offers to the favored customers. (R., p. 8) And finally, respondent argues that petitioner did not demonstrate even "some" knowledge of its competitors' actions. (R.Br., p. 9).

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[1] This table is based upon the testimony elicited from competitors and salesmen who were called to appear at the hearing on remand.

The table of ads itself stands as the most obvious refutation of respondent's various statements. There is no question that the prior competitor ads were in fact run.[2] Nor can there be any doubt that petitioner had knowledge of them. It had such knowledge, first, as a reasonable and prudent businessman who keeps abreast of what its competitors are doing in the marketplace (e.g., JA 190, 278), i.e., as a manufacturer who reads newspapers and has direct communication with customers through salesmen; and second, by virtue of its utilization of the Advertising Checking Bureau which kept petitioner informed both as to the accuracy and commercial efficacy of its own ads and which kept petitioner informed of the ads run and paid for by its competitors.

Further, respondent's characterization of petitioner's evidence completely ignores the procedural hardships under which petitioner was laboring in this case. Having first been denied the right to elicit its defense through cross-examination, and then having been required to make the defense four years after the *prima facie* case was established and up to nine years after the happening of the events in question, a reasonable approach would have been to dismiss the complaint, or at the very least not hold the petitioner

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[2] Further, there can be no doubt that the ads which were run were cooperative ads, i.e., paid for in part or in whole by the manufacturer. Cooperative advertising is a commercial way of life in the brassiere industry (JA 304) and it is indeed the rare ad which is not at least partially paid for by the manufacturer. It is also not open to question that petitioner did not initiate cooperative advertising in the industry, but rather, as a latecomer in the industry, it adopted a long-established trade practice. For example, Warner's has employed cooperative advertising since the turn of the century. (JA 339).

to a stricter evidentiary requirement with respect to a subjective subject like foreknowledge.[3]

3. In considering petitioner's awareness or foreknowledge, respondent also ignores the practical marketplace difficulties which confront a seller in a Section 2(d) situation, as opposed to the market situation under Section 2(a).[4] Petitioner admits at the outset of this analysis the existence of a certain affinity between Sections 2(a) and 2(d). In fact, Section 2(d) found its genesis in a felt need to broaden the proscriptions of Section 2(a). (*Cf.* Patman, *The Robinson-Patman Act,* 38 (1st ed. 1938)). Both are generally designed to preclude the anticompetitive evils attendant upon discrimination (in whatever form) by a seller between his buyers.

However, there are distinct differences between the two sections. For example, Section 2(a) provides a seller with a "cost justification" provision which allows him to negative any inference of discrimination by showing that the different prices accorded two competing buyers is justified on the basis of genuine cost savings. There is no such "cost justification" provision in Section 2(d). The absence of such a justification in the "payments for services or facilities" section

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[3] The petitioner has throughout these proceedings, since the Commission's decision in *Forster,* sought the opportunity to introduce additional evidence which would satisfy this strict evidentiary standard. The Commission and the court have denied the petitioner this opportunity.

[4] Respondent's attempt (p. 8, n. 5) to read out of this case petitioner's contention on this point is a little too eager. This point was alluded to by the Court of Appeals in its decision (App. A, p. 2a) and briefly treated by petitioner in its petition. (Pet., p. 16).

has been rationalized on the basis that price discriminations "could be more readily detected and . . . it would be much easier to make accurate comparisons with any cost savings." (Baum, *The Robinson-Patman Act,* 143).

Apparently, therefore, even though a violation of Section 2(d) is no more commercially offensive than a 2(a) violation, the reason for sustaining a charge of a 2(d) violation without regard to competitive injury is because of the *difficulty of inquiring into the terms of the allowances made.* This difficulty is especially pertinent in the cooperative advertising context, since each competitor makes its payments pursuant to a "plan", each containing numerous factors, terms and conditions. This "difficulty of measurement" feature which inheres in 2(d) situations is not apparent in a 2(a) context, where a certain nice mathematical certainty obtains. Dollar-for-dollar differences can be readily and easily measured. Not so the multiple terms and conditions of the various cooperative advertising plans obtaining in the brassiere industry.

It is petitioner's contention that, by a parity of reasoning, the different considerations obtaining in determing *if* a violation exists in a 2(a) context as opposed to that of 2(d) should also be accorded significance in determining if the meeting competition defense has been sustained, i.e., since mathematical certainty is not attainable in finding a 2(d) violation, as it is in finding a 2(a) violation, this factor should be given significant weight in determining what is required to make out the Section 2(b) defense to a Section 2(d) discrimination finding and in determining what relevance Section 2(a) criteria have in the 2(d) situation.

If the problem is approached from this direction, rather than from the Commission's and the Court of Appeals' mechanistic application of Section 2(a) criteria, it becomes readily apparent that the Section 2(a) criteria only have limited relevance in the Section 2(d) area. Neither the respondent in its brief nor the Commission or the court in their opinions made this distinction; they failed to recognize the "difficulty of measurement" problem and what it argues for this case.

Further respondent's brief ignores the difficulties facing a seller in attempting to obtain knowledge of his competitors' actions. It also fails to recognize the problems presented by the necessity for interpretation once he does learn of his competitors' actions. If he were simply meeting *prices,* the determination would be simple, since it is an elementary arithmetical task to compare a number of prices to see which is the lowest. It is a radically different task to undertake a meaningful mathematical comparison of the cooperative advertising "plans" offered by petitioner's competitors in this case, or a specific allowance made pursuant to a plan. The record reflects the details of at least seven manufacturers' plans, each with multiple terms or conditions, some containing entirely unique features. (JA 215). It is evident that no pat mathematical basis exists for comparison of these plans such as is available in the Section 2(a) situation. Therefore, for the 2(b) defense to have any relevancy in the 2(d) area something less than the specific foreknowledge required under 2(a) should be demanded. What that something is has not been settled and it is a question open for this Court's consideration and resolution.

4. On page 9 of its brief, respondent gives cursory consideration to the *Forster* case and finds petitioner's reliance thereon misplaced. Respondent completely ignores the existence of a conflict between the *Forster* decision and the decision of the Court of Appeals in the instant case. Although petitioner referred to the *Forster* case and its relevance for this case at great length in the petition (Pet., pp. 14-20), respondent either misunderstands or simply chooses to ignore petitioner's argument on this point. In order that the point at issue not be obscured, petitioner deems it necessary to now reiterate (albeit reluctantly) in summary form its argument on this question.

a. During the hearings after remand, petitioner and the hearing examiner were at odds concerning the standard to be applied in a Section 2(b) applied to Section 2(d) case. Petitioner argued that *Staley* and all other Section 2(a) price discrimination cases had only limited relevance in a Section 2(d) case, and that a lesser degree of specific knowledge of competitors' actions should be required because of the difficulties faced in the marketplace by a seller in meeting competition in a Section 2(d) context. The hearing examiner believed that *Staley* controlled, and argued that petitioner was required to prove that it had specific foreknowledge of each and every action of its competitors' in each specific individual competitive situation. (*Compare* JA 247-48 *with* JA 265). Petitioner argued that *Staley* did not go that far and that even if it did, such knowledge should not be required in a Section 2(d) case. Petitioner believed that the examiner was engrafting an added dimension on *Staley* while pretending allegiance to that standard.

b. Shortly after the close of the record by the hearing examiner (after the hearings on remand), the Commission handed down its first decision in the *Forster* case (*Forster Mfg. Co.*, CCH Trade Reg. Rep. ¶ 16,423 (Dkt. 7207, 1963)). In its decision the Commisison articulated for the first time a specific foreknowledge requirement in a Section 2(a) price discrimination case.

c. Shortly after the Commission's *Forster* decision, petitioner made a motion to the hearing examiner to reopen the record to allow petitioner an opportunity to adduce evidence as to petitioner's specific foreknowledge of its competitors' actions. Petitioner stated that it believed the Commission's formulation of the standard in *Forster* to be wrong and an enlargement on the *Staley* reasonable and prudent businessman standard, but argued that since this new dimension had not been in existence at the time petitioner was making out its defense at the remand hearings, and since the examiner (who had not as yet made his final decision) and Commission would be bound by the stricter standard in deciding the case, it would not be fair to petitioner and would deny it Due Process to fail to reopen the hearings to give petitioner an opportunity to meet the more stringent foreknowledge standard. The hearing examiner denied petitioner's motion, stating that the Commission's *Forster* decision was not an added dimension to the *Staley* standard, but rather "in fact represents no change in long-established precedents. The same holding was clearly enunciated by the Supreme Court as long ago as 1945 in the . . . Staley case". (Pet., p. 15).

d. In appealing the examiner's decision to the Commission, petitioner requested at the outset that the Commission require the examiner to reopen the record to give petitioner an opportunity to meet the more stringent *Forster* standard. The Commission refused petitioner this relief and in its decision affirming the examiner's decision, the Commission held that there was in fact no difference between *Staley* and *Forster*. (Pet., p. 15).

e. After petitioner filed its petition for review in the Court of Appeals for the District of Columbia Circuit, it made a motion to that court to have the case remanded to the Commission in order that petitioner might be given a chance to meet the more stringent *Forster* standard. Petitioner argued that although it disagreed with the commission's *Forster* decision, petitioner was not bound by that standard when it put in its evidence at the hearings on remand, but both the examiner and Commission were bound by the more stringent standard in deciding the case. The court denied the motion to remand.

f. Shortly after the court denied the motion to remand the First Circuit Court of Appeals handed down its decision reversing the Commission's *Forster* case on the foreknowledge question. The court held that the Commission's formulation of the standard was "stricter than that laid down in . . . *Staley*", and that the Commission's standard "defied common sense". 355 F. 2d at 55.

g. On the strength of the First Circuit's decision, petitioner immediately made another motion to the Court of Appeals, this time to reconsider the

court's previous denial of the motion to remand. Petitioner reiterated its previous arguments with the addition of the argument that the First Circuit's decision vindicated petitioner's position in the present case, and that it would be unfair to have petitioner have its case decided by the court without giving petitioner an opportunity to meet the more stringent standard which both the examiner and Commission had applied. The court denied this motion.

h. Before the Court of Appeals, petitioner reiterated all of the arguments previously noted with the additional argument that if the court affirmed the Commission's decision, i.e., if it approved the Commission's formulation of the standard, the result would be that the Court would be in conflict with the First Circuit Court of Appeals on the "foreknowledge" question. *In affirming the Commission's decision, the Court of Appeals did not even refer to the Forster decision, but rather held that petitioner had not met the Staley standard.* In its decision, the Court noted that it agreed with the Commission that "Exquisite Form's evidence was insufficient to support its [defense]". (App. A, p. 3a). Since the Commission was relying upon the *Staley*-as-enlarged-upon-by-*Forster* standard in determining that petitioner's evidence was not sufficient, it is apparent that the Court of Appeals was applying the stricter *Staley*-as-enlarged-upon-by-*Forster* standard in the same manner as did the Commission and the examiner. It is thus apparent that the Court of Appeals would require a higher standard of knowledge of a seller's competitors' actions than *Staley* requires. *In so requiring, it*

is in direct conflict with the First Circuit and this Court should grant this petition so that the conflict can be settled,[5] *and so that guiding criteria can be established in the Section 2(b) as applied to Section 2(d) situation.* See *supra* at page 2.

5. Respondent's argument (pp. 10-11) on the question of petitioner's having been denied the right of cross-examination defies characterization. It ignores: (1) That the hearing examiner had ruled in the first hearing (when petitioner was putting in a 2(b) defense to a Section 2(e) charge, which at that time was held to be a valid defense) that a petitioner could make out the 2(b) defense by cross-examination; That the Commission affirmed this ruling in its first decision; That the Commission, in considering petitioner's arguments in the second hearing did not deny the fact that the right existed—in fact, it admitted as much (JA 220), even though it went on to speculate that even if petitioner had had the opportunity for such cross-examination, it did not believe that petitioner could make out the defense.

Respondent argues in the face of this authority that (1) Petitioner failed to show that these witnesses were unavailable and requested no subpoenas to determine whether they were available; and (2) That in any event

[5] If this Court agrees with the standard as formulated by the Commission and affirmed by the Court of Appeals, this case should be remanded to afford petitioner an opportunity to meet the more stringent standard. Petitioner has reiterated its willingness throughout to try to meet the standard, although protesting that it is more stringent than is required under *Staley,* but neither the Commission nor the court would give it this opportunity. If, on the other hand, this Court agrees with petitioner that the standard has been misapprehended and misapplied, it should grant the petition in order to establish just what the standard should be.

the question whether the favored customers had received offers or payments from petitioner's competitors was outside the scope of the direct examination by complaint counsel in establishing that petitioner had in fact made the discriminatory payments to the favored customers.

In the first place, petitioner did make a showing that some of the witnesses were no longer available. While petitioner did not specifically state such in its motion to strike, produce witnesses or dismiss, it argued such to the examiner (JA 237, 279) and the thrust of the motion itself was that the long delay precluded petitioner from being able to produce such witnesses. In the second place, petitioner did subpoena those witnesses who were still available[6] to attempt to establish the defense (contrary to the respondent's statement at R. Br., p. 10) and some witnesses were in fact no longer available (e.g., JA 316). In the third place, to argue that petitioner would have been precluded at the first hearing from making out its defense by cross-examination, had the defense been available, on the basis that such was outside the scope of the direct testimony is to exult sophistry over common sense reasoning. We are dealing here with a twentieth century administrative proceeding, not a trial in a nineteenth century common law court. To argue as outside the scope of direct testimony a petitioner's examination of a favored customer concerning whether such customer had, prior to receipt of petitioner's discriminatory ad, run an ad paid for by one of petitioner's competitors, is to argue the ridiculous. Certainly, if petitioner's ads were

[6] The only witnesses available were Mrs. Vitale (JA 299) and Mr. Biblowitz (JA 311). The answers to interrogatories of Mrs. Robert Scerbo (JA 342) and Mr. S. Carl Mark (JA 345) were read into the record.

in fact run in response to previous ads by its competitors, the action of the favored customer vis-a-vis petitioner's competitor would be of the very essence of not only the defense but also the discrimination. If the competitor's previous action was in fact what triggered petitioner's ad in response, then the actions of the favored customer must be examined both with relation to petitioner's discriminatory ad and with respect to the competitor's previous ad. This is not outside the scope of the direct testimony (even assuming such a highly technical nonadministrative evidentiary ruling were proper here); it is of the very essence of the direct testimony and respondent's attempt to make it anything else falls of its own unsupported (and unsupportable) weight.

The gist of the matter is that petitioner has been denied a fundamental right and no amount of ex post facto rationalizing by respondent can change this fact. Further the Commission's conjecture or speculation as to what petitioner could or could not do, which conjecture and speculation was affirmed, *sub silentio* by the Court of Appeals, should not be allowed to go unreproved. Petitioner does not believe it comports with either Due Process or administrative fair play to be conjectured out of court—petitioner prefers to have its rightful opportunity to make out its defense by way of cross-examination.[7]

6. Finally, respondent argues that even though the Commission has recognized in three cases occurring after the instant one that shorter delays in time than is present in the instant case were sufficient to prejudice

[7] A right also guaranteed in administrative hearings by Administrative Procedure Act, 5 U.S.C. § 1006(c).

a party in making out his defense, it was perfectly proper for the Commission, affirmed by the Court of Appeals, to withhold such relief in the present case. It argues such on the basis that petitioner made no showing that it was prejudiced by such delay.

First, if it takes something more than common sense to recognize that a delay of from four to nine years prejudices a party in making out what the Commission and court held to be a subjective-oriented defense, petitioner has in fact shown that something more by specific evidence. Petitioner invites the Court's attention to JA, pp. 329-30, 333, 357 for specific instances supporting this argument. But respondent's argument is founded upon an even more glaring error. *In none of the three cases cited by petitioner* (Pet., pp. 27-30) *did the Commission even examine into the question of whether the particular petitioner had made a showing of prejudice because of the passage of time.* For example, in the *Beatrice Foods* case cited by petitioner, the Commission stated that

> "evidence which respondent would have to adduce would in all probability not be found in written records [i.e., because they would no longer be available] but in the memories of witnesses which may have faded by now . . . We are not convinced that any useful purpose would be served nor even that due process could be achieved by remanding this case now . . .". 3 CCH Trade Reg. Rep. at pp. 22, 472.

The opinion of Chairman Dixon in the *Bearing* case cited in the Petition at page 27 is precisely to the same effect.

It is fundamentally unfair to expect more of petitioner whose rights were delayed an even greater

length of time, especially where such delay was the direct result of the Commission's overly-restrictive attitude toward the defense in the first place.

For the reasons stated petitioner requests that the Court grant the writ of certiorari.

Respectfully submitted,

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